

STATE OF MICHIGAN
IN THE SUPREME COURT

SUSAN BLACKWELL,

Plaintiff-Appellee,
vs.

SC: 155413
COA: 328929
Oakland CC: 2014-141562-NI

DEAN A. FRANCHI and DEBRA
FRANCHI,

Defendant-Appellants.

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PLAINTIFF-APPELLEE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL BRIEF
IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

Dated: 12/29/2017

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QUESTIONS PRESENTED

- A. Whether a genuine issue of material fact exists as to whether drop-off in Appellants' mud room was open and obvious when the mud room appeared level with the hallway and was unlit.**

Trial Court: No.

Court of Appeals: Yes.

Appellee: Yes.

Appellants: No.

- B. Whether Appellee presented evidence establishing a genuine issue of material fact as to whether Appellants breached their duty as licensors to warn of hidden dangers creating an unreasonable risk of injury to licensees when Appellants knew the mud room contained a drop-off and was unlit at the time of Appellees fall and failed to warn Appellee of the conditions.**

Trial Court: No.

Court of Appeals: Yes.

Appellee: Yes.

Appellants: No.

PROCEDURAL HISTORY

On June 26, 2014, Appellee filed a Complaint against Appellants arising from a fall that occurred at Appellants' residence. (Appendix at 3a). On June 3, 2015, there was a hearing and oral argument before the trial court for Appellants' *Motion for Summary Disposition*. The trial court granted Appellants' *Motion for Summary Disposition* for the reasons stated on the record. (Appendix at 392a). Appellee filed an appeal by right of the *Order* granting Appellants' *Motion for Summary Disposition* to the Michigan Court of Appeals. After hearing oral arguments, the Court of Appeals reversed and remanded the *Order* granting Appellants' *Motion for Summary Disposition*. (Appendix at 394a-399a). As a result, Appellants filed the instant Application for Leave to Appeal.

STATEMENT OF FACTS

On December 14, 2013 at approximately 8:00 p.m., Susan Blackwell (Appellee) arrived at Dean Franchi and Debra Franci's (Appellants) home for a holiday party. (Appendix at 65a). After entering the home, Appellee made her way to the back of the house where the festivities were taking place. (*Id.*).

On her way to the back of the home, Appellee was instructed by Appellant Debra Franchi she could place her purse in a small room to the left. (Appendix at 66a). As she went to walk into the mud room, Appellee missed the step and fell onto the ground. (Appendix at 68a-69a). There were no lights on in the mudroom and the surrounding areas were dimly lit. (Appendix at 66a). The floor from the hallway to the mud room looked level and there was no indication there was an 8 inch drop at the entrance of the mudroom.

Appellants provided photographs of the area where Appellee fell. (Appendix at 97a, 127a-130a). The photographs clearly show the mudroom and the hallway to be level and the

extreme darkness of the mudroom when the lights are off. Multiple witnesses testified the mudroom was very dark at the time of Appellee's fall and that the mud room floor appeared level with the floor in the hallway.

Appellee testified during deposition, she had never been in the mudroom at Appellants' home prior to her fall on December 14, 2013. (Appendix at 65a). Appellee testified the lights in the mudroom were off at the time of her fall and it was very dark in the mudroom. In fact, she testified it was so dark, she wasn't able to see anything inside the mudroom including the bench or door to the garage. (Appendix at 69a). Appellee also testified the foyer and hallway surrounding the mudroom were dimly lit. (Appendix at 65a-66a). Lastly, Appellee testified the mudroom appeared level with the hallway and there was no indication of any step. (*Id.*).

Endia Simmons was standing directly behind Appellee and witnessed the fall. (Appendix at 166a). Ms. Simmons testified during deposition, Appellant Debra Franchi informed herself and Appellee they could store their purses in the mudroom. (Appendix at 172a-173a). Ms. Simmons further testified she was not able to see any height differential between the hallway and the mudroom and assumed it was all one level. (Appendix at 173a, 175a, 179a). She described the mudroom as "pitch black." (Appendix at 185a).

Ms. Simmons also testified it was very dark in the mudroom as the lights in the mudroom and the hallway were off at the time of Appellee's fall. (Appendix at 172a-172a). In fact, Ms. Simmons testified if she had been the one to enter the mudroom first, she would have fallen because there was no way to tell any height differential existed. (Appendix at 179a). Ms. Simmons also testified the only lights on were at the back of the house in the kitchen and in the family room (Appendix at 171a-172a). Ms. Simmons further testified the mudroom on the date of Appellee's fall was darker than any of the photographs attached as Exhibit A. (Appendix at

181a-183a). Lastly, Ms. Simmons testified Appellee sat on the couch, quiet and in pain the entire time she remained at Appellants home. (Appendix at 178a).

Appellee further testified during her deposition, she immediately experienced pain in her back and legs. (Appendix at 150a). She was physically assisted to the couch in the great room, where she remained for a short while before leaving and assisted home by her friends, Jane and Dave Brogan.

LAW AND ARGUMENT

I. Standard of Review

This Court reviews the grant or denial of summary disposition *de novo* to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id.* at 119. In reviewing a motion for summary disposition under MCR 2.116(C)(10), a court considers “affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion.” *Greene v A P Prods, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006) (internal quotations and citations omitted).

The test is whether the kind of record that might be developed, giving the benefit of any reasonable doubt to the nonmoving party, would leave open an issue upon which reasonable minds might differ. *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994). A motion under MCR 2.16(C)(10) must be denied where the proffered evidence establishes a genuine issue regarding any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358; 567 NW2d 314 (1996).

II. The Michigan Court of Appeals did not err in reversing the Circuit Court’s grant of summary disposition because the evidence established Appellants violated their duty owed to Appellee.

“A landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved.” *James v Alberts*, 464 Mich 12, 11; 626 NW2d 158 (2001). The open and obvious doctrine provides that “if the particular activity or condition creates a risk of harm *only* because the invitee [or licensee] does not discover the condition or realize its danger” then liability is cut off “if the invitee [or licensee] should have discovered the condition and realized its danger.” *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d185 (1995).

As a general rule a drop-off, like a step, does not in and of itself create a risk of harm since if seen a reasonable person can readily transverse it without incident. While “the danger of tripping and falling on a step is generally open and obvious[,] . . . where there is something unusual about the steps because of their character, location, or surrounding conditions, then the duty of the possessor of land to exercise reasonable care remains.” *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 17-18; 643 NW2d 212 (2002) (quotations omitted). See also, *Bertrand* at 624 (though no duty to warn because step was open and obvious, a question of fact existed whether the step itself, given its location and traffic, created an unreasonable risk of harm).

In this case, however, the danger from the drop-off arose “because [Appellee] d[id] not discover the condition or realize its danger.” *Id.* Thus, the question is whether “[Appellee] should have discovered the condition and realized its danger.” *Id.*

- a. Appellee was a licensee and presented evidence establishing the drop-off into the mud room was not discoverable upon casual inspection.

Appellee presented evidence in the form of deposition testimony from several other party guests establishing the drop-off into the mud room was not discoverable upon casual inspection at the time she encountered it. Guest Endia Simmons testified that she was walking with plaintiff when plaintiff fell. Simmons testified, “[W]e didn’t realize that there was a step down because there [were] no lights in that particular room.” Simmons further testified that “you could not see that there was a level down” and stated that “[i]t just looked like it was straight across.” Simmons also stated that had she been walking ahead of plaintiff she likely would have fallen.

Guest Ebony Whisenant corroborated Simmons’s description of the mud room entrance testifying at her deposition that the hallway into the mud room looked level and that the height differential could not be seen. (Appendix at 93a-95a). Whisenant described the mud room as “very dark.” (*Id.*). Additionally, the deposition testimony of the guests and Appellant Dean Franchi were in agreement that the light inside the mud room was turned off at the time of Appellee’s fall. (Appendix at 106a). The photographs submitted by the parties also demonstrate that the drop-off is not easily seen, even with sufficient lighting. The testimony and photographs clearly demonstrate a question of fact of whether an average user acting under the conditions existing when Appellee approached the mudroom would have been able to discover the drop-off upon casual inspection.

- b. Appellee presented evidence establishing Appellants knew or should have known the mudroom contained a drop-off and was dark and unlit immediately before Appellee’s fall.

Generally, the law “will impute knowledge of the dangerous condition to the premises possessor if the dangerous condition is of such a character or has existed for a sufficient time that

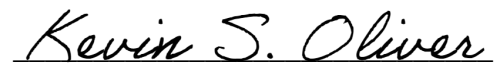
a reasonable premises possessor would have discovered it.” *Grandberry-Lovette v Garascia*, 303 Mich App 566, 575; 844 NW2d 178 (2014).

In this case, Appellee also presented evidence in the form of deposition testimony establishing Appellants’ knowledge of conditions in the mud room. Appellant Dean Franchi testified Appellants lived at the premises for approximately six years prior to Appellee’s fall. (Appendix at 101a). Appellant Dean Franchi further testified he knew both the mudroom contained black colored flooring, (Appendix at 103a), and the drop-off in the mudroom existed. (*Id.*). Appellant Dean Franchi also admitted the lights in the mudroom were off at the time of Appellee’s fall. (Appendix at 106a). In addition, Appellant Dean Franchi further admitted the mudroom is very dark when the lights are off. (Appendix at 104a). Notwithstanding Appellants’ knowledge of the conditions of its premises, Appellants failed to warn Appellee of the hazard and, thus, violated their duty to warn of a hidden danger. (Appendix at 84a). Therefore, Appellants knew of the hidden danger and breached their duty to warn Appellee.

RELIEF REQUESTED

Based on the foregoing reasons, Appellee respectfully requests this Honorable Court deny Appellants’ Application for Leave to Appeal in its entirety.

Respectfully submitted,


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PROOF OF SERVICE

I hereby certify that on December 29, 2017, I electronically filed the foregoing document upon all counsel of record using TrueFiling E-File and Serve.

/s/Brenda Taylor
Brenda Taylor